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No. 90-271

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH N. AQUILINA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a naturalized citizen father has standing to challenge the "stateless" status his children had at the time they were born abroad when the children have since been naturalized as citizens and were fully able to bring suit in their own names when this suit was filed but did not do so.

2. Whether a naturalized citizen has a constitutional or statutory right to pass on citizenship to his children regardless of the circumstances of their births.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	7
Cutting, Ex parte, 94 U.S. 14 (1876)	6
Fiallo v. *Bell*, 430 U.S. 787 (1977)	10
Kleindienst v. *Mandel*, 408 U.S. 753 (1972)	10
Leaf Tobacco Board, Ex parte, 222 U.S. 578 (1911)	6
Rogers v. *Bellei*, 401 U.S. 815 (1971)	8
Runnett v. *Shultz*, 901 F.2d 782 (9th Cir. 1990)	8, 10
Singleton v. *Wulff*, 428 U.S. 106 (1976)	6
UAW v. *Scofield*, 382 U.S. 205 (1965)	6

Constitution and statutes:

U.S. Const.:	
Art. III	5, 7
Amend. XIV, § 1	8
Immigration and Nationality Act of 1952, ch. 477, § 301, 66 Stat. 235-236	2
§ 301, 8 U.S.C. 1401	10
§ 301(a), 8 U.S.C. 1401(a) (1976)	2, 9, 10, 11
§ 301(a)(4), 8 U.S.C. 1401(a)(4) (1976)	9
§ 301(a)(7), 8 U.S.C. 1401(a)(7) (1976)	2-3, 4, 6, 7, 8, 9
§ 301(c)-(g), 8 U.S.C. 1401(c)-(g)	10
§ 301(g), 8 U.S.C. 1401(g)	2
8 U.S.C. 1101(a)(22)	9

Miscellaneous:

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	6

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OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 14-15, and the district court, Pet. App. 16-22, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1990. Pet. App. 14. An untimely motion for extension of time to "appeal" [1] was denied on May 11, 1990. Pet. App. 24-25. The petition for a writ of certiorari was filed on July 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Petitioner was apparently seeking untimely rehearing by the court of appeals.

STATUTE INVOLVED

Section 301(a) of the Immigration and Nationality Act of 1952 (INA), ch. 477, § 301, 66 Stat. 235-236 (formerly codified at 8 U.S.C. 1401(a)), governed the transmission of citizenship by descent at the time petitioner's children were born in 1958 and 1959. It provides in pertinent part:

> Sec. 301. (a) The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.[2]

STATEMENT

Petitioner filed a complaint in the United States District Court for the Eastern District of Michigan seeking a declaration that INA Section 301(a)(7)

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[2] The current version is codified as amended at 8 U.S.C. 1401(g). It differs from its predecessor principally by requiring five years of physical presence in the United States, at least two of which must be after the age of 14, rather than ten and five years respectively.

(formerly codified at 8 U.S.C. 1401(a) (1976)) is unconstitutional. The district court dismissed petitioner's complaint for want of standing and on the merits. The court of appeals affirmed.

1. Petitioner immigrated to the United States on December 5, 1952, from the island of Malta and became a citizen of the United States by naturalization on November 18, 1955, while he was serving in the United States Army in Frankfurt, Germany. After his discharge, petitioner remained in Germany to attend the University of Munich Medical School. Petitioner married a German national while in medical school and the couple had two children, born in Munich, Germany, in 1958 and 1959. Pet. App. 17-18.

Petitioner's children were not United States citizens at birth because they were born abroad, one parent was an alien, and the other parent (petitioner), although a U.S. citizen, did not then have ten years' physical presence in the United States (including credit for his military service), as required by INA Section 301(a)(7).[3] Pet. App. 18.

Petitioner's wife and children immigrated to the United States in August, 1959, and became naturalized citizens on May 1, 1968. Pet. App. 18.

2. On August 9, 1988, petitioner filed a complaint, App., *infra*, 1a-4a, in federal district court seeking a declaration that INA Section 301(a)(7) is uncon-

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[3] Petitioner alleges that his children were not West German citizens because petitioner was an alien and West Germany did not recognize citizenship by birth on its soil (*jus soli*). Pet. 3. Petitioner claims that his children were declared to be stateless by the German authorities, and were issued "stateless" passports by West Germany. App., *infra*, 2a.

stitutional. The injuries alleged all derive from the application of Section 301(a)(7) to petitioner's children. For example, petitioner contends that his children were "abandoned" by the United States and allowed to become stateless; that his children have to answer "stateless" whenever questionnaires ask them to state their citizenship at birth; that his daughter, an officer in the Michigan National Guard, had difficulty obtaining security clearances because she once was "stateless"; and that both children would like to be eligible to hold the office of President of the United States but are ineligible because of Section 301(a)(7). App., *infra*, 2a-3a.

At oral argument on petitioner's motion for summary judgment (and the government's cross-motion to dismiss), petitioner insisted that Section 301(a)(7) violates his own right to transmit citizenship by blood (*jus sanguinis*). Pet. App. 21. By depriving him of this right, that Section allegedly renders him a "second-class citizen." App., *infra*, 4a.

3. The district court dismissed petitioner's complaint with prejudice for failure to state a claim upon which relief can be granted. Pet. App. 16. To the extent petitioner's children have been wronged, the district court reasoned, "they alone are the ones with standing to assert their rights." *Id.* at 21. To the extent petitioner seeks redress for violation of his right to transmit citizenship by descent, the district court held that neither the Constitution nor an Act of Congress gave him that right. *Id.* at 22.

4. The court of appeals affirmed. In an unpublished opinion, it concluded:

> The core of Aquilina's action is his claim that he had a constitutionally cognizable right to pass on his citizenship to his children regardless of the

> circumstances of their birth. No such absolute right exists in law. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971). Aquilina lacks standing to assert claims on behalf of his adult children, both of whom are naturalized citizens, hold advanced degrees, and are presumptively capable of litigating their own claims.

Pet. App. 15.

ARGUMENT

The decision of the courts below is correct and does not conflict with the judgment of any other court. Two independent bases support the dismissal of petitioner's complaint: his lack of standing to seek redress for injuries suffered, if at all, by his children; and the absence in the Constitution or any Act of Congress of an unqualified right to transmit citizenship by blood.

1. Petitioner lacks standing to litigate the issues raised in his complaint because the injuries alleged are borne entirely by his children. The claimed injuries consist of the abandonment of petitioner's children by the United States at the time of their births some 30 years ago; the requirement that petitioner's children respond to questionnaires asking for citizenship status at birth by answering "stateless"; petitioner's daughter's past difficulty obtaining security clearances; and the ineligibility of both children to hold the office of President of the United States.

To whatever extent these claims are cognizable at all under Article III,[4] petitioner is not the proper

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[4] Some of the claims (*e.g.*, abandonment and difficulty in obtaining security clearances) appear to be moot, and one (ineligibility to assume the office of President) appears to be unripe.

plaintiff to assert them. Petitioner may not litigate the rights of third parties (here, his children) unless some "genuine obstacle" prevents them from maintaining an action themselves. *Singleton* v. *Wulff*, 428 U.S. 106, 114-116 (1976). That condition is not satisfied in this case. As the court of appeals explained, petitioner's "adult children are both naturalized citizens" who "hold advanced degrees" and are therefore "presumptively capable of litigating their own claims." Pet. App. 15.

That capability is evident in the motion filed by petitioner's children in this Court seeking to intervene and to petition for a writ of certiorari. Although the motion demonstrates that petitioner's children could have challenged the merits of Section 301 (a)(7) in a properly filed lawsuit, that lawsuit is not petitioner's. At least in the absence of extraordinary circumstances (which have not been shown here), this Court has consistently stated that "[o]ne who is not a party to a record and judgment [below] is not entitled to appeal therefrom." *Ex parte Leaf Tobacco Board*, 222 U.S. 578, 581 (1911); see *UAW* v. *Scofield*, 382 U.S. 205, 209 (1965); *Ex parte Cutting*, 94 U.S. 14, 20-22 (1876).[5] Moreover, in this case

[5] As one treatise explains:

> In general, however, intervention at the Supreme Court level is a remedy seldom invoked and rarely granted. In most situations, one must have intervened below, or at least sought to intervene below, in order to have any kind of standing to petition for certiorari. Only for the most imperative of reasons and where one's interests may otherwise be lost will the Court entertain a motion to intervene in pending proceedings before the Court.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 616, at 341 (6th ed. 1986).

the motion to intervene in order to file a petition for a writ of certiorari is jurisdictionally out of time. The time for filing a petition seeking review of the court of appeals' judgment expired on July 9, 1990; the document filed by petitioner's children—styled a "Petition for Writ of Certiorari" and "Motion to Intervene"—was filed on or about October 24, 1990. Furthermore, allowing petitioner's children to intervene at the petition stage is not necessary to protect their rights. The outcome of this litigation does not foreclose a challenge by petitioner's children to INA Section 301(a)(7). Although the judgment below is unquestionably adverse precedent in the Sixth Circuit, that judgment runs only against petitioner, not his children.

The only claim petitioner makes on his own behalf is that denying him the "right" to transmit his citizenship by descent (*jus sanguinis*) makes him a "second-class citizen." Pet. 8. Petitioner lacks standing to assert this claim as well. "Second class citizenship" is a stigmatizing injury too abstract to be judicially cognizable under Article III. See *Allen* v. *Wright*, 468 U.S. 737, 750-757 (1984). Petitioner alleges no concrete, adverse personal consequences of his so-called "second class" status, and his subjective feelings do not constitute the type of injury sufficient to give him standing.[6]

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[6] Even if petitioner had standing to challenge INA Section 301(a)(7) because his children's statelessness made him feel like a second class citizen, that claim became moot when petitioner's children were naturalized in 1968. Petitioner does not claim that *he* is subject to greater government scrutiny because his children were once stateless, or that he is having trouble obtaining a security clearance or aspiring to the Presidency.

2. On the merits, petitioner claims that he has a right to transmit to his children the United States citizenship he had when they were born. Pet. 5, 6, 10. The Constitution provides no such right. As originally adopted, the Constitution referred to citizenship "in general terms and in varying contexts" but did not define it. *Rogers* v. *Bellei*, 401 U.S. 815, 828 (1971). The Fourteenth Amendment, adopted in 1868, subsequently provided that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens * * *." U.S. Const. Amend. XIV, § 1. To this day, the Constitution makes no provision for *jus sanguinis*, or citizenship by descent. Thus, acknowledging petitioner's claim that he is a Fourteenth Amendment citizen, Pet. 9, does not mean that his children born abroad have any right under the Constitution to United States citizenship at birth. To the contrary, this Court "has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Rogers* v. *Bellei*, 401 U.S. at 830. "[O]ur law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute." *Id.* at 828.

Petitioner's right to confer citizenship by descent must accordingly be traced to an Act of Congress. "The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Runnett* v. *Shultz*, 901 F.2d 782, 783 (9th Cir. 1990). The law governing petitioner's children is therefore the law in effect in 1958 and 1959—*i.e.*, Section 301(a)(7) of the Immigration and Nationality Act of 1952. In petitioner's circumstances

(marriage to an alien spouse), that Section provides that children born abroad are U.S. citizens only if the citizen parent has been "physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years." Even counting his two-year service in the United States Army, petitioner did not have the "physical presence" required by Section 301(a)(7). It follows that petitioner's children were not citizens at birth.

Pointing to a different subsection of INA Section 301(a), petitioner claims that Congress "created" a statutory "right to the passage of 'jus sanguinis,' * * * with only one year of residence in the United States, prior to the birth of the children." Pet. 5, 10 (citing INA Section 301(a)(4)). Petitioner meets the one-year physical presence requirement, but concedes that he fails to satisfy the statutory requirement that his spouse be a national of the United States rather than an alien.[7] Petitioner nevertheless argues that the one-year physical presence requirement of Section 301(a)(4) should be applied, rather than the ten-year requirement of 301(a)(7), because the latter provision unconstitutionally discriminates against him and his children, and makes him a "second-class citizen." Pet. 5, 8, 10.

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[7] Section 301(a)(4) applies to children born abroad to parents, one of whom is a citizen, and the other a national of the United States but not a citizen. A national of the United States who is not a citizen differs from an alien in that the national "owes permanent allegiance to the United States." 8 U.S.C. 1101(a)(22). Thus, under Section 301(a)(4), both parents will have significant ties to the United States, justifying the shorter physical presence requirement.

Legislative distinctions in the area of immigration and naturalization are subject to only limited judicial review. See *Fiallo* v. *Bell*, 430 U.S. 787, 792-799 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-770 (1972). There need be only a discernible, facially legitimate, and bona fide reason for any such distinctions, whether the reasons are articulated or not. *Fiallo* v. *Bell*, 430 U.S. at 794-795; *Runnett* v. *Shultz*, 901 F.2d at 787. Considered in its entirety, Section 301(a) presents a logical, internally consistent statutory scheme governing the acquisition of United States citizenship at birth. Under that scheme, the right of children born abroad to acquire United States citizenship at birth depends in part upon their parents' ties to the United States. As the parents' ties to the United States become more tenuous, the statutory residency requirements become longer. See 8 U.S.C. 1401(c)-(g) (current version of Section 301).[8] Consistent with this principle, the physical presence required to confer citizenship on the offspring of a citizen and an alien (such as petitioner and his West German wife) is properly longer

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[8] The current statute, 8 U.S.C. 1401, follows this pattern:

Subsection	*Birth place*	*1st Parent*	*2d Parent*	*Residency Req'd*
(c)	abroad	citizen	citizen	1 parent —some
(d)	abroad	citizen	national	citizen— 1 yr
(e)	outlying U.S. possession	citizen	alien	citizen— 1 yr
(g)	abroad	citizen	alien	citizen— 5 yrs*

* 10 years at the time petitioner's children were born.

than that required for the offspring of a citizen and a national. The distinction drawn by Section 301(a) appears entirely rational on its face, and more than satisfies the standards applicable in limited judicial review.

CONCLUSION

The petition of Joseph N. Aquilina for a writ of certiorari should be denied. The motion of Rosemarie Barone and Joseph W. Aquilina to intervene and file a petition for a writ of certiorari should also be denied.

Respectfully submitted.

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NOVEMBER 1990

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 88CV10226BC

JOSEPH N. AQUILINA, M.D.
3406 Davenport Street
Saginaw, Michigan 48602
(517) 799 4840, PLAINTIFF

vs.

UNITED STATES OF AMERICA
U.S. Justice Department
Immigration & Naturalization
Washington, D.C. 20536, DEFENDANT

[Filed Aug. 9, 1988]

COMPLAINT FOR SUMMARY JUDGMENT FOR THE DETERMINATION OF THE CONSTITUTIONALITY OF SECTION 301(a)(7), OF THE NATIONALITY ACT OF 1952, NOW DESIGNATED SECTION 301(g), OF THE NATIONALITY ACT OF OCTOBER 10, 1978

1. Plaintiff is a citizen of the United States and a resident of Michigan.

2. The plaintiff immigrated to the United States on December 5, 1952, from the island of Malta. He was drafted in the United States Army on October 11, 1954 and served honorably and faithfully until his release from active duty on October 10, 1956 at Karlsruhe, Germany for the purpose of attending the University of Munich Medical School. He became a United States Citizen by naturalization on November 18, 1955 at Frankfurt, Germany while serving with the United States Army in Europe. He married Mrs. Johanna Elizabeth Aquilina, née Gleissner on August 31, 1957 at Rosenheim, Germany. She was a German National and they were married in Rosenheim, Germany. They had two children born in Munich, Germany: Mrs. Rosemarie E. A. Barone, J.D. (née Aquilina) who was born on April 25, 1958 and Joseph Wolfgang Aquilina, M.D. who was born on March 27, 1959. These children were denied United States Citizenship under Section 301(a)(7), Title III, of the Immigration and Nationality Act of 1952. After a series of exchanges with the U.S. Justice Department these children were declared to be 'STATELESS' citizens by the State of Bavaria, West Germany and they were issued 'Stateless' passports by that same authority. So the children of a United States citizen were abandoned by the United States under this Section 301(a)(7), and a foreign power allowed to assume jurisdiction and declare them 'stateless' citizens. Their mother then applied for an emigrant visa for herself (as the wife) and the children of the plaintiff at the U.S. Consulate in Munich and they were issued U.S. emigrant visas. They subsequently entered the United States as legal immigrants in August 1959 at the port of New York.

3. The children of the Plaintiff: Rosemarie E. A. Barone, J.D. and Joseph Wolfgang Aquilina, M.D. became naturalized citizens of the United States along with their mother under Section 320(a), of the 1952 Nationality Act on May 1, 1968. The children have continued to answer United States Government questionaires [*sic*] with the question: "What was your citizenship at birth?" They have to answer 'STATELESS'. Rosemarie E.A. Barone, J.D. is an officer in the Michigan National Guards and as such has difficulties obtaining certain security clearances because of her 'stateless' connotation. She has chosen a political career for her future and certainly like her brother would like to believe that she can aspire to hold the office of president of the United States. These children were born after that [*sic*] the plaintiff had become a Naturalized Citizen of the United States, served honorably and faithfully in the United States Armed Forces and had fulfilled all the requirements set by Congress for United States citizenship, including residence within the United States. The Fifth and Sixth Amendments protect against such denial of United States Citizenship per 'jus sanguinis' to children of United States citizens, touching as it does on the most precious right of citizenship, must be justified by some more urgent public necessity than substituting administrative convenience for individual right of which citizen is deprived. Therefore under the Fourteenth Amendment rights of United States Citizenship of the plaintiff, Stat. #1993 (Comp. St. #3947) and at Common Law, these children have the right to United States citizenship per 'Jus Sanguinis' and are in fact born citizens of the United States.

WHEREFORE, the premises considered, the plaintiff demands Judgement against the Constitutionality of Section 301(g) of the Nationality Act of October 10, 1978. This Section continues to deny the plaintiff 'due process and equal protection of the law' under the Fourteenth Amendment. It also discriminates and is so unjustifiable as to violate the 'due process' intent of the Fifth Amendment. In so doing the Court will restore to the plaintiff those rights that were denied and still continue to be denied thus making him a de facto and a de jure second-class citizen of the United States. The Court' also by this decision will restore to the plaintiff's progeny, Rosemarie E.A. Barone, J.D. (née Aquilina) and Joseph Wolfgang Aquilina, M.D. their constitutional right to be born citizens of the United States. Should this constitutional issue be beyond the constitutional jurisdiction of this Court, the plaintiff prays and request [*sic*] 'Certiorari'. Otherwise the Court may refer this matter to the proper authority for adjudication.

Plaintiff demands Summary Judgement.

by /s/ Joseph N. Aquilina
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